Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-356

In the Supreme Court of the United States

OCTOBER TERM, 1996

MOFFITT, ZWERLING & KEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23 pp

QUESTIONS PRESENTED

1. Whether the government's specifying assets subject to forfeiture in a bill of particulars is "inherently unconstitutional."

2. Whether the Comprehensive Forfeiture Act of 1984 preempted the use of state law remedies in support of the government's narcotics interdiction efforts.

3. Whether the government stated a claim for conversion under Virginia law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

CHoPP Computer Corp. v. *United States*, 5 F.3d 1344 (9th Cir. 1993), cert. denied, 115 S. Ct. 63 (1994)	17, 18
Caplin & Drysdale, Chtd. v. *United States*, 491 U.S. 617 (1989)	4, 10, 11, 12
English v. *General Electric Co.*, 496 U.S. 72 (1990)	15
Hayle v. *United States*, 815 F.2d 879 (2d Cir. 1987)	12
Huddleston v. *Dwyer*, 322 U.S. 232 (1944)	17
Libretti v. *United States*, 116 S. Ct. 356 (1995)	7, 12, 13
Mack v. *United States*, 853 F.2d 585 (8th Cir. 1988)	12
Peyote Way Church of God, Inc. v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991)	17
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)	15
United States v. *Allen*, 442 U.S. 140 (1979)	17
United States v. *Broce*, 488 U.S. 563 (1989)	12
United States v. *Grammatikos*, 633 F.2d 1013 (2d Cir. 1980)	13
United States v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806)	15, 16
United States v. *Lot 5*, 23 F.3d 359 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995)	17
United States v. *Mathews*, 833 F.2d 161 (9th Cir. 1987)	12

Cases—Continued: Page

United States v. *Mechanik*, 475 U.S. 66 (1986) .. 13
United States v. *Monsanto*, 924 F.2d 1186 (2d Cir.), cert. denied, 502 U.S. 943 (1991) 14
United States v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993) 17
United States v. *Raimondo*, 721 F.2d 476 (4th Cir. 1983), cert. denied, 469 U.S. 837 (1984) 13
United States v. *Stazola*, 893 F.2d 34 (3d Cir. 1990) 17
United States v. *Texas*, 507 U.S. 529 (1993) 8-9
Valencia v. *United States*, 923 F.2d 917 (1st Cir. 1991) 12

Constitution, statutes and rule:

U.S. Const.:
Amend. V 10, 11
Grand Jury Clause 11
Amend. VI 10, 11
Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. III, 98 Stat. 2040 14
21 U.S.C. 853 ..... 2, 4, 5, 6, 10
21 U.S.C. 853(a) 3
21 U.S.C. 853(c) 6, 9, 15, 16
21 U.S.C. 853(n) 2, 4
21 U.S.C. 853(n)(6) 8
21 U.S.C. 853(n)(6)(B) 4
21 U.S.C. 853(p) 9
21 U.S.C. 881(h) 17
21 U.S.C. 903 17
Fed. R. Crim. P. 7(c)(2) 13

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-356

MOFFITT, ZWERLING & KEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 83 F.3d 660. The opinions of the district court (Pet. App. 22a-52a, 53a-88a, 124a-152a) are reported at 875 F. Supp. 1190, 875 F. Supp. 1152, and 846 F. Supp. 463, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1996. A petition for rehearing was denied on June 4, 1996 (Pet. App. 169a). The petition for a writ of certiorari was filed on September 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a criminal prosecution brought in the United States District Court for the Eastern District of Virginia, the United States obtained a determination that $103,800 paid by a criminal defendant to petitioner represented the proceeds of that defendant's narcotics trafficking, and was therefore forfeitable under 21 U.S.C. 853. The district court rejected petitioner's claim that it was an "innocent owner" under 21 U.S.C. 853(n), but accepted petitioner's claim that the government could not rely on Virginia law to recover the bulk of the money, which petitioner had dissipated. The court of appeals affirmed the district court's finding that petitioner was not an "innocent owner" entitled to relief from forfeiture under Section 853(n), but it reversed the district court's ruling that the government was barred by Section 853 from pursuing state-law causes of action. Pet. App. 1a-21a.

1. Between 1990 and 1991 William Paul Covington was the subject of a grand jury investigation into narcotics trafficking. As a result of that investigation, Covington's assets worth hundreds of thousands of dollars were seized, because they were derived from his narcotics activities. Covington responded to the investigation and seizures by retaining the law firm of Phillips, Beckwith and Hall, but he ultimately elected not to contest the seizures, and most of the property was forfeited administratively. Pet. App. 125a.

In August 1991, after the uncontested seizures of the great bulk of his property, Covington retained petitioner Moffitt, Zwerling & Kemler to take over his defense from the Phillips, Beckwith law firm. Covington paid petitioner's retainer fee of $103,800 in

cash, in two installments. The first installment of $17,000 was paid on August 23, 1991, with a "wad of bills" that Covington "fished from his pocket." Pet. App. 3a; *id.* at 135a. The second installment of $86,800 was delivered on the next day in bundles of cash "stuffed into a shoe box or Ritz cracker box." *Id.* at 21a. Petitioner did not inquire as to the source of Covington's funds, but instead, as the court of appeals put it, "engag[ed] in * * * a wink and nod ritual whereby [it] agreed not to ask * * * too much." *Id.* at 9a. After receiving each bundle of cash, petitioner complied with Covington's request that a receipt not be issued to him—a request based on Covington's expressed fear that any such receipt might fall into the hands of the FBI. *Id.* at 135a-136a; *id.* at 8a-9a. Petitioner also failed to report Covington's identity on Internal Revenue Service Form 8300, as required by law. *Id.* at 3a, 127a & n.7.

In October 1991, Covington was indicted. Pet. App. 4a. That indictment, and a superseding indictment returned in January 1992, both provided for the forfeiture of "any and all" property constituting proceeds of Covington's drug dealing activities or used to facilitate those activities, pursuant to 21 U.S.C. 853(a). Pet. App. 4a, 180a-183a. The indictments further provided that such property "includ[ed], but [was] not limited to," 12 listed assets, one of which was identified as "$168,000 in United States currency." *Id.* at 126a-127a, 181a, 183a. In May 1992, the United States filed a bill of particulars stating that the $103,800 fee paid to petitioner was subject to forfeiture. *Id.* at 4a, 191a. The government obtained a restraining order to prevent dissipation of the fee. *Id.* at 4a.

Covington decided to plead guilty, but petitioner discouraged him from doing so on the ground that such a plea would place petitioner's acceptance of the fee in an unfavorable light. Pet. App. 4a, 129a. After petitioner's stance came to light, the district court determined that petitioner had placed itself in a conflict of interest and disqualified petitioner from further representing Covington. *Ibid.* The court appointed new counsel for Covington. On the advice of that new counsel, Covington entered a plea of guilty to three counts of the indictment. In accordance with that guilty plea, the court ordered, subject to the rights of innocent third parties under 21 U.S.C. 853(n), the forfeiture of virtually all of Covington's assets, including the legal fee paid to petitioner. Pet. App. 4a, 129a-130a.

2. Petitioner filed a motion to vacate the order forfeiting its $103,800 fee under 21 U.S.C. 853(n)(6)(B). Petitioner claimed that it was "reasonably without cause to believe" that the fee was subject to forfeiture. Pet. App. 4a-5a. The district court denied the motion. *Id.* at 5a. After a two-day evidentiary hearing, the district court determined that the "record compels the conclusion that the $103,800 in cash" paid to petitioner "constituted the proceeds from Covington's drug trafficking activities," adding that "[t]here was simply no credible or persuasive evidence to the contrary." *Id.* at 130a-131a. Relying on *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617 (1989), the district court rejected (Pet. App. 137a) petitioner's claim that law firm fees are not subject to forfeiture under 21 U.S.C. 853, and added that *Caplin & Drysdale* did not stand for the proposition that attorneys' fees "may be subject to forfeiture only through notice in an indictment"; rather, "fees

received prior to indictment are subject to forfeiture where the other requirements of § 853 are met." Pet. App. 138a-139a. Finally, the court explained that petitioner could not reasonably have believed that the $103,800 in cash was derived from legitimate sources, because, in light of the suspicious circumstances under which petitioner accepted the fee, any such belief "was at best a hope, and a forlorn one at that." *Id.* at 140a; see also *id.* at 150a (noting that petitioner failed to establish "innocent owner" defense).

The government then sought to obtain a final decree of forfeiture of petitioner's $103,800 fee. Pet. App. 5a. The district court ruled, however, that 21 U.S.C. 853 entitled the government to recover only $3,695, which was the amount that petitioner claimed it had not spent from the original fee of $103,800, plus any specific property acquired by petitioner with Covington's drug proceeds. Pet. App. 120a. The court took "no position" on whether the government might sue petitioner to recover the dissipated assets under state law. *Id.* at 123a n.49.

3. While relying on Section 853 to recover property traceable to the $103,800 paid to petitioner for legal fees, the government also pursued state-law remedies against petitioner. Pet. App. 5a. On October 21, 1994, the government filed a civil action seeking to recover the $103,800 on the basis of two theories: conversion and detinue (*i.e.*, replevin) under Virginia law. *Id.* at 26a. Petitioner countered that the government had failed to establish the elements of those state-law claims. *Id.* at 30a. The district court agreed as to detinue, because it interpreted Virginia law to require "that the defendant must have

possession of the disputed property at the time the action commences." *Id.* at 32a.[1]

As to conversion, the district court concluded that the government had stated a claim under Virginia law, but it held that a conversion action was preempted by federal law in these circumstances. Pet. App. 34a-42a. The court first explained that under the plain language of the "relation back" provision (see 21 U.S.C. 853(c)), the government had a right to immediate possession of the $103,800 in August 1991, when petitioner converted the money to its own use.[2] Thus, the government met the state-law requirement that a plaintiff show a right to "immediate possession" of the property at the time the conversion occurred. Pet. App. 34a-39a. The court nonetheless concluded that the government's conversion claim was preempted by the "comprehensive criminal forfeiture scheme" in 21 U.S.C. 853, relying particularly on the fact that Section 853 expressly authorizes the recovery of "substitute assets" from criminal defendants but contains no parallel authorization with respect to third parties. Pet. App. 43a-51a. The court accordingly dismissed the government's conversion action as "preempted by federal law." *Id.* at 52a.

---

[1] The district court acknowledged that Virginia cases render a defendant liable in detinue even when he has transferred the property, unless the transfer occurred by operation of law. But the court concluded that the Virginia cases are not "recent ones," and that those cases would not be followed today by the Virginia courts. See Pet. App. 33a n.16.

[2] Alternatively, the court determined that under 21 U.S.C. 881(b)(4), the government had authority to seize the $103,800 in August 1991, because the government had probable cause at that time to seize all of Covington's cash under the civil forfeiture statute. Pet. App. 40a-42a.

4. Petitioner and the United States both appealed. The court of appeals affirmed the district court's denial of petitioner's motion to vacate the order forfeiting the cash Covington paid to petitioner, but it reversed the preemption ruling and reinstated the government's state-law action for conversion. Pet. App. 1a-21a.[3]

a. The court rejected as "meritless" (Pet. App. 6a) petitioner's claim that the district court lacked jurisdiction to enter the forfeiture order because the $103,800 in cash transferred to petitioner was not specified in the superseding indictment of Covington. The court noted that the indictment did list (*id.* at 182a-183a), among the assets to be forfeited, "any and all properties constituting, or derived from" proceeds obtained as a result of Covington's criminal activity, including $168,000 in United States currency that had not yet been accounted for. *Id.* at 6a. The court also explained that no further detail was required, because, under *Libretti* v. *United States*, 116 S. Ct. 356 (1995), forfeiture is part of a criminal sentence, not an element of any substantive criminal offense; thus, "[a] bill of particulars is an appropriate way to pinpoint certain assets, noted in the indictment, as subject to forfeiture." Pet. App. 6a-7a. Petitioner's argument to the contrary, the court added, was "little more than an attempted end-run around" this Court's decision in *Caplin & Drysdale*, "which squarely rejected constitutional claims lodged against attorney fee for-

---

[3] In light of its conclusion that the conversion action should be reinstated, the court of appeals found it unnecessary to reach the government's argument that the district court had also erred in dismissing the government's detinue claim. Pet. App. 18a n.3.

feiture." *Id.* at 7a. In any event, the court noted, petitioner could not show any prejudice from the grand jury's failure to name the $103,800 paid to petitioner, in haec verba, as one of the assets encompassed within the forfeiture allegation, because the district court found that that cash was indeed forfeitable "proceeds of criminal activity" and petitioner did "not even contest" that finding in the court of appeals. *Ibid.*

The court of appeals next rejected petitioner's claim that it was an innocent transferee of the forfeited property under 21 U.S.C. 853(n)(6). Pet. App. 8a-9a. The court of appeals could "find no fault" in the district court's factual findings in this regard, *id.* at 8a, agreeing that the circumstances surrounding Covington's large cash payment "were, to put it mildly, highly suspicious." *Id.* at 9a. The court also noted that petitioner's attorneys "tiptoed around the most pertinent questions" concerning the source of Covington's funds, and it concluded that the record as a whole disclosed "nothing less than a mass of evidence available to [petitioner] in August 1991 that pointed convincingly to the conclusion that the cash fee constituted, or was derived from, drug trafficking proceeds." *Ibid.* (internal quotation marks omitted). In those circumstances, the court concluded, petitioner "reasonably had cause to know that the $103,800 was subject to forfeiture, and thus its § 853(n)(6) petition was properly rejected." *Ibid.*

b. Turning to the government's appeal, the court of appeals agreed with the district court's conclusion that "the government * * * stated the elements of a conversion action" under Virginia law. Pet. App. 18a. The court of appeals rejected, however, the district court's view that a conversion action is preempted by the federal forfeiture statutes. Relying on *United*

States v. *Texas*, 507 U.S. 529 (1993), the court of appeals explained that, in general, "common law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights." Pet. App. 12a. The court further explained that the government's reliance on the "relation back" provision in 21 U.S.C. 853(c) to establish one element of the government's common law cause of action "does not remove this case from the reach of *Texas*." Pet. App. 13a. Rather, the court noted, "[j]ust as any party might rely on legal or contractual authority to establish a right to possess a piece of property, the government has the perfect right to point to other provisions of law that confer a right to possession of the fee." *Ibid.*

The court of appeals rejected the notion that the "substitute assets" provision of 21 U.S.C. 853(p), which allows the government to recover substitute assets from a criminal defendant, forbids "by negative implication" (Pet. App. 14a) any recovery from third-party transferees who no longer possess forfeited property. *Ibid.* The court noted that "[f]ar from creating a positive conflict" or "impeding the purposes of" the federal forfeiture statute (*id.* at 15a), the "state actions pursued by the government *promote* the aims of the statute." *Ibid.* And while the court of appeals accepted petitioner's contentions that the forfeiture statute "recognizes and protects the interests of third-party transferees," the court concluded that "[t]he extent of that protection * * * is spelled out in § 853(n), which prevents the forfeiture of assets held by innocent third parties." *Id.* at 16a. Petitioner, the court observed, "was given the full benefit

of this provision, but it failed utterly to demonstrate that it was an innocent transferee." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 13-20) that the government's use of a bill of particulars to specify that petitioner's $103,800 fee was subject to forfeiture was "inherently unconstitutional." In support of that contention, petitioner characterizes the decision below (Pet. 16-17) as permitting the government to circumvent the Fifth and Sixth Amendment rights of criminal defendants and the Fifth Amendment rights of "innocent" defense counsel who have given value for the fee. Petitioner also suggests that it is "undisputed" (Pet. 15-16) that the government used forfeiture as a tactical weapon to disqualify petitioner from Covington's representation. Those allegations not only reprise petitioner's tactic of attacking the government in order to divert attention from its own misconduct (see Pet. App. 20a-21a), but also unfairly characterize or treat as "undisputed" matters that *were* disputed by the government *and* were found adversely to petitioner in the courts below. To put it briefly, both courts below concluded that petitioner is *not* entitled to the protections that the forfeiture statute affords to "innocent" parties; moreover, as the court of appeals noted, the district court disqualified petitioner from Covington's representation because of "disturbing" evidence (*id.* at 21a) that petitioner subordinated Covington's interests to its desire to retain a fee that was clearly forfeitable under Section 853 and this Court's decision in *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617 (1989). See also Pet. App. 7a (noting that "the district court, after extensive review of the record, conclud[ed] that there

is no factual predicate for asserting a claim of prosecutorial abuse") (internal quotation marks omitted).[4]

Indeed, contrary to petitioner's assertion, this case does not properly present any issue concerning the constitutional rights of criminal defendants. While this Court held in *Caplin & Drysdale* that criminal defense counsel, in challenging the forfeiture of funds paid as attorneys' fees, could rely on *jus tertii* to assert their client's Sixth Amendment right to the assistance of counsel, see 491 U.S. at 623 n.3, it does not necessarily follow that defense counsel may rely on *jus tertii* to assert the defendant's rights under the Grand Jury Clause of the Fifth Amendment, which does not address the relationship between the accused and counsel. Moreover, *Caplin & Drysdale* did not involve a law firm which, like petitioner, was disqualified from the representation because the firm's "desire to protect its fee was overriding its obligation to represent its client," Pet. App. 7a, and thus had placed itself in a position of square antagonism to the client's interests. In these circumstances, petitioner's claim that Covington was deprived of a

---

[4] In a similar vein, petitioner contends that "there is no dispute that the $168,000 in cash [listed in Covington's indictment] refers to specific cash other than that paid to" petitioner. Pet. 19 n.9. In the court of appeals, however, the government affirmatively disputed, and rebutted, petitioner's assertion by referring the court of appeals to specific testimony heard by the grand jury that indicted Covington. See Gov't C.A. Answering and Reply Br. 18-19 & n.16. While it is evident that petitioner continues to disagree with the merits of our argument, it is difficult to see how that disagreement entitles petitioner to represent to this Court that "there is no dispute" on the question.

meaningful grand jury indictment may be rejected on the basis of the usual rule that, by pleading guilty, Covington himself elected to waive any such defect. See, *e.g.*, *United States* v. *Broce*, 488 U.S. 563, 569 (1989); *Mack* v. *United States*, 853 F.2d 585, 586 (8th Cir. 1988) (guilty plea "waives all challenges to the prosecution * * * except challenges to the court's jurisdiction"); *United States* v. *Mathews*, 833 F.2d 161, 163-164 (9th Cir. 1987) (same); *Hayle* v. *United States*, 815 F.2d 879, 881 (2d Cir. 1987) (same); see also *Valencia* v. *United States*, 923 F.2d 917, 920 (1st Cir. 1991) (reaffirming waiver rule and noting that a defendant who has pleaded guilty accordingly "may not later contest the factual and theoretical foundations of the indictment to which he has pled").

In any event, there is no sound basis for petitioner's claim (Pet. 18) that *Caplin & Drysdale*, 491 U.S. at 632 n.10, must be taken to establish the proposition that "any assets which the Government wishes to have forfeited must be specified in the indictment." Recently, this Court placed in context the similar statement in *Caplin & Drysdale* that "forfeiture is a substantive change in the indictment" (see *id.* at 628 n.5), explaining that the Court "intended only to suggest that a defendant cannot escape an otherwise appropriate forfeiture sanction by pointing to his need for counsel to represent him on the underlying charges." *Libretti* v. *United States*, 116 S. Ct. 356, 363 (1995). In fact, the Court's decision in *Caplin & Drysdale* did not purport to restrict the government's use of a bill of particulars to pinpoint assets listed more generally in an indictment as being subject to forfeiture. As the court of appeals explained, the filing of a bill of particulars is an established method of specifying assets subject to forfeiture. Pet. App.

7a. See, *e.g.*, *United States* v. *Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (Fed. R. Crim. P. 7(c)(2) "does not * * * require that the indictment describe each item subject to forfeiture. This can be done in a bill of particulars."), cert. denied, 469 U.S. 837 (1984); *United States* v. *Grammatikos*, 633 F.2d 1013, 1024-1025 (2d Cir. 1980). Indeed, in *Libretti*, the government identified additional property subject to forfeiture in a bill of particulars, 116 S. Ct. at 366, and the Court upheld the subsequent forfeiture order. *Id.* at 367.

Finally, apart from the legal shortcomings of petitioner's theory, there is no support in the record for petitioner's basic claim that the forfeiture in this case occurred without any "neutral check" such as would have been provided by "the grand jury's probable cause scrutiny." Pet. 18. Even assuming, contrary to the conclusions of both courts below, that the cash transferred to petitioner was not encompassed within the forfeiture allegations of the indictment, petitioner had the benefit of an adversary hearing on the question of forfeitability in the district court, which gave petitioner far more than it could have expected from the ex parte judgment of the grand jury. Compare *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986). After that hearing, the district court concluded that "[t]here was simply no credible or persuasive evidence" that the fee was anything other than "proceeds from Covington's drug trafficking activities." Pet. App. 131a. Because petitioner chose not to challenge that finding on appeal, the court of appeals correctly concluded that "[i]t is

* * * difficult to identify any prejudice to [petitioner] from the procedure followed here." *Id.* at 7a.[5]

2. Petitioner further contends (Pet. 21-25) that the Comprehensive Forfeiture Act of 1984 (CFA), Pub. L. No. 98-473, Tit. II, Ch. III, 98 Stat. 2040, preempts Virginia law to the extent the government might rely on such law to recover the $103,800 in cash that Covington paid petitioner. Petitioner, however, does not allege that there is a conflict in the courts of appeals on this issue, and indeed does not cite a single case for the proposition that the CFA preempts state common law remedies such as conversion. Accordingly, further review is not warranted.

In upholding the government's right to pursue state law remedies, the court of appeals relied upon this Court's recent analysis in *United States* v. *Texas*, which reiterated the long-standing principle that federal statutes are presumed to complement common law remedies, absent clear legislative intent

---

[5] There is no merit to petitioner's contention (Pet. 5 & n.2, 17) that the court of appeals' resolution of the bill of particulars issue is inconsistent with *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), and similar cases from other circuits that have required an adversary hearing on whether probable cause supports a forfeiture of attorneys' fees. As we have noted, petitioner had the benefit of such a hearing. And, in any event, those cases lend no support to petitioner's contention that the Constitution precludes the use of a bill of particulars to specify assets subject to forfeiture. Indeed, the only reference in *Monsanto* to a bill of particulars is the court's observation that "where an indictment alleged that the government would seek forfeiture of all profits and property susceptible to that penalty, and a bill of particulars identified the forfeitable properties, this procedure satisfied the requirement of Fed. R. Crim. P. 7(c)(2)." *Id.* at 1196.

to the contrary. Pet. App. 11a-13a. See *English* v. *General Electric Co.*, 496 U.S. 72, 83 (1990) ("no basis for * * * contention that all state-law claims arising from conduct covered by [federal statute] are necessarily included in the pre-empted field"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 257-258 (1984) (rejecting contention that the award of punitive damages under state tort law conflicted with the remedial scheme under federal law regulating nuclear facilities). Petitioner attempts to distinguish *Texas* on the ground that a holding of preemption in that case would have weakened governmental rights, whereas a holding of preemption in the present case allegedly "would not weaken any preexisting common law right of the government to conversion," because, under petitioner's analysis, no such right exists. Pet. 25. Petitioner's argument in this regard is circular, and reduces to the assertion that underlies the third question presented by the petition, *i.e.*, that Virginia law would not recognize a conversion claim under the circumstances of this case.

3. Petitioner's final claim (Pet. 25-30) is that the government failed to satisfy one of the elements of conversion under Virginia law, *viz.*, a right to immediate possession of the property, because the government's claim as to that element was impermissibly predicated on the "relation back" doctrine of 21 U.S.C. 853(c). In asserting that claim, petitioner principally relies upon *United States* v. *Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337 (1806), a case on which petitioner placed so little stock in the courts below that it was first cited, in a petition for rehearing, only after the court of appeals ruled adversely to petitioner.

It is far from clear that *Grundy* actually decided the question framed by petitioner, since immediately after the passage quoted by petitioner (see Pet. 29), the Court declined to "inquire whether an action on the case against *Grundy & Thornburgh*, for money had and received to the use of the United States, be a proper action in which to establish a forfeiture for a fact committed by Aquila Brown," and it further noted it had merely "suggest[ed]" the probable "objections to the action, without deciding on them." *Grundy*, 7 U.S. at 354. Moreover, whereas Covington's guilt in the present case was adjudicated as a result of his guilty plea, the underlying crime in *Grundy* was "yet remaining to be proved." *Id.* at 355. The actual holding of *Grundy* is limited to the subsequent discussion that the government could not maintain a statutory cause of action under the "Act for registering and recording ships and vessels" (*id.* at 349), because such an action for value "c[ould] only be supported against the person who has taken the [statutory] oath," not against a third-party purchaser of the bankrupt's property. *Id.* at 355. Finally, there is no indication in *Grundy* that the transferees had any reason to believe that the property was subject to forfeiture, whereas in this case the courts below rejected petitioner's claim that it was an "innocent" owner of the cash it received from petitioner. The court of appeals simply held that petitioner could not convert the cash to its own purposes in those circumstances.

In any event, the decision below stands for no more than the proposition that, as a matter of state law, Virginia courts would recognize the government's right to possession under 21 U.S.C. 853(c) to the same extent that they would give effect to any other "legal

or contractual authority [that] establish[es] a right to possess * * * property." Pet. App. 13a. Nothing in *Grundy* could possibly conflict with that proposition, and the court of appeals' interpretation of Virginia law is not otherwise worthy of this Court's review. See, *e.g.*, *Ulster County Court* v. *Allen*, 442 U.S. 140, 153-154 (1979); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).[6]

There is no greater merit to petitioner's claim (Pet. 26) that the court of appeals' analysis conflicts with *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993), and *CHoPP Computer Corp.* v. *United States*, 5 F.3d 1344 (9th Cir. 1993), cert. denied, 115 S. Ct. 63 (1994). In *Buena Vista*, the Court concluded that the government cannot avail itself of the statutory "relation back" provision in the civil forfeiture statute, 21 U.S.C. 881(h), until the third-party property claimant "has had the chance to invoke and offer evidence to support the innocent owner defense under [21 U.S.C.] 881(a)(6)." *Buena Vista*, 507 U.S. at 129. That holding does not help petitioner, who was

---

[6] Petitioner also contends (Pet. 24, 7 n.3) that the court of appeals' reliance on 21 U.S.C. 903 conflicts with the decisions of three other courts of appeals. See *United States* v. *Lot 5*, 23 F.3d 359 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995); *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210 (5th Cir. 1991); *United States* v. *Stazola*, 893 F.2d 34 (3d Cir. 1990). The court of appeals, however, merely cited Section 903 to rebuff petitioner's claim that the federal forfeiture laws effectively "occupy the field to the exclusion of state law." Pet. App. 17a; *id.* at 14a. Nothing in the cases cited by petitioner shows that the court of appeals erred in citing Section 903 for that proposition. Indeed, consistent with Section 903, all three cases were resolved in favor of the government's authority to pursue its narcotics interdiction activities to the maximum extent allowable under law.

afforded a two-day evidentiary hearing on its claim that it was an innocent owner (or "bona fide purchaser") of the $103,800. See Pet. App. 130a. The government relied on the relation-back doctrine to establish one element of the tort of conversion *after* the district court determined that petitioner could not sustain its claim of innocence, and therefore obtained no intervening property right that would prevent the operation of the relation-back doctrine.

CHoPP Computer is similarly unhelpful to petitioner's cause. In that case, the Ninth Circuit interpreted California law to hold that the United States, as a judgment lienholder, was not liable to the retroactive owner of a constructive trust. The court explained that there was "no California law that suggests that CHoPP may rely upon a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final." *CHoPP Computer*, 5 F.3d at 1348. Consequently, the Ninth Circuit held, "the imposition of a constructive trust did not give CHoPP title" to the property in question "at the time of the Government's levy," and the government thereore "did not commit a conversion" at the time it levied the funds. *Id.* at 1349. After analyzing *CHoPP Computer*, the district court in this case concluded that the Ninth Circuit's reasoning "clearly reveals that the retroactive effect of a constructive trust in California law differs greatly from the retroactive effect of a forfeiture order in federal law." Pet. App. 38a n.20. Petitioner does not even attempt to rebut that conclusion. *CHoPP Computer* thus has scant relevance to criminal forfeiture under federal narcotics laws and surely does not pose a conflict with the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DANIEL S. GOODMAN
Attorney

DECEMBER 1996